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AHMED MIRZA SAHEB v. THOMAS.

It appears that, in execution of a certain decree obtained by one Thomas against Mahomed Mirza, the property in suit was attached as belonging to the judgment-debtor. The plaintiff preferred a claim, but his claim was disallowed, and the property in question was ordered to be sold. Thereupon, the plaintiff brought the present suit to have it declared that the property belonged to him and not to Mahomed Mirza.

It seems to us that this was a suit where consequential relief was asked for. It was a suit which was brought for the purpose of establishing the plaintiffs' right to the property in question, and with a view to free the property from the attachment which had been put upon it, and to protect it from being sold as the property of Mahomed Mirza. In this view of the matter, we are of opinion that the suit would not fall within Art. 17 of the Sch. II of the Court Fees Act, and that the *ad valorem* duty as prescribed by Sch. I was payable upon the plaint.

Our attention has been called to certain decisions of the Bombay and Allahabad High Courts. No doubt these decisions are in favor of the view taken by the appellant, but they are opposed to a ruling of this Court—*Jalaluddin Mahomed* v. *Shohorullah* (1), and from enquiry we have made upon the subject, it appears that this ruling has been for several years followed in this Court in taxing and levying Court-fees payable upon petitions of appeal. We agree in the principle laid down in the said ruling, and accordingly dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

Before Mr. Justice Norris and Mr. Justice Macpherson.

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June 17.

SUNGUT LAL (PLAINTIFF) *v.* BAIJNATH ROY AND OTHERS (DEFENDANTS).*

Interest—Interest at increased rate—Penalty—Contract Act, ss. 60, 74—*Appropriation of payments.*

In consideration of an advance of Rs. 118, the defendants executed in favor of the plaintiff a mortgage bond, dated 3rd November 1879, by which

* Appeal from Appellate Decree No. 631 of 1886, against the decree of Baboo Bolae Chand, Subordinate Judge of Bhagulpore, dated the 26th of December 1885, modifying the decree of Baboo Kali Kumar Bose, Munsiff of Begusserai, dated the 30th of December 1884.

(1) 15 B. L. R., Ap. 1 ; 22 W. R., 422.

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it was stipulated that the amount should be repaid "in kind by delivery of half the amount of the rubbi crops of every description produced at the first class rates, and in case the same is not paid in kind, it will be paid principal with interest from the date of execution at one anna per cent. per mensem in cash in the month of Baisakh 1287 F.S. (April 1880)." The defendants admitted execution of the bond, and pleaded payments in grain to the amount of Rs. 136, which they failed to prove. It was found that the plaintiff had received payments in grain to the extent of Rs. 71, more than half of which, however, he claimed to be entitled to appropriate to the payment of other antecedent debts which were due to him by the defendants. It was not stated at the time of payment towards which debt the payments were to be applied; but all the payments were admittedly made in kind: *Held*, that the plaintiff was not entitled to appropriate the payments to the antecedent debts, inasmuch as, within the meaning of s. 60 of the Contract Act, there were "other circumstances" indicating that the payments were made in liquidation of the amount of the bond. *Held*, also, that the increased rate of interest being made payable from the date of the bond, and not only from the breach of the contract, must be taken to be in the nature of a penalty and only to be taken into consideration as a basis upon which damages for the breach of contract were to be estimated. The principle on this subject laid down in the case of *Mackintosh* v. *Crow* (1) approved of.

THIS suit was brought for the recovery of Rs. 464-14, being the amount of principal and interest due on a registered mortgage bond, dated the 4th Kartick 1287 F.S. (3rd November 1879), alleged to have been executed by the defendants Baijnath Roy and Nunku Roy in favor of the plaintiff for Rs. 118-1. The condition in the bond was that the amount was to be repaid "in kind by delivery of half the amount of the rubbi crops of every description produced at the first-class rates, and, in case the same is not paid in kind, it will be paid principal, with interest, from the date of execution at one anna per cent. per mensem in cash in the month of Bysack 1287 F.S. (April-May 1880), by the defendants, and the mortgage will be thereby redeemed."

The plaintiff admitted having received Rs. 33-7 in grain towards the payment of the debt.

The defendants admitted execution of the bond, but stated that they had paid in grain Rs. 136 from time to time in repayment

(1) I. L. R., 9 Calc., 689.

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of the amount borrowed; they also pleaded that the plaintiff ought not to recover interest at the rate claimed, which was inserted in the bond as a penalty and imposed to obtain the speedy realization of the money covered by the bond.

On the evidence it appeared that the plaintiff had received payments in grain to the amount of Rs. 71 from the defendants, but had appropriated all but Rs. 33-7 to other debts which were undisputed due from them to him. The Munsiff held that he was justified in doing this, and that the defendants had failed to prove their payments of Rs. 136. He held also that the interest was at a penal rate to which the plaintiff was not entitled. He gave a decree for the principal Rs. 118 and the same amount for interest, making Rs. 236, with costs in full and interest at 6 per cent per annum. From this decision the defendants appealed and the plaintiff preferred a cross appeal. The defendants contended that the decision was wrong in not allowing their alleged payments to be credited, and in awarding costs at the full amount. The plaintiff questioned the decision of the Munsiff in respect of the award of interest at a lower rate than that stipulated for.

The Subordinate Judge held that the defendants were entitled to be credited with the Rs. 71 admitted by the plaintiff to have been paid, inasmuch as the plaintiff was not entitled under the circumstances to appropriate the payments to other debts, without showing, as he had failed to do, that the payments were actually made in respect of the other debts. He said: "As according to the terms of the bond the defendants were to pay a penalty in default of paying grain as stipulated, it must be held that what they paid was towards the satisfaction of the bond, unless the contrary was shown, and that it could in no way be justifiable to allow the plaintiff to credit the grain paid by the defendants to some other account, and make the defendants pay a penalty at a heavy rate of interest on the ground of default which they actually did not make."

The Subordinate Judge gave a decree for Rs. 47, the amount of principal after deducting Rs. 71, with costs on the proportionate sum decreed and 6 per cent interest. He refused to allow any of the interest claimed on the bond, being of opinion,

for the reasons stated by them above, that the plaintiff had not been dealt fairly by the defendants.

The plaintiff appealed to the High Court.

Baboo *Nilkant Lahory* for the appellant.

Baboo *Kishorey Lall Goswami* for the respondents.

The following cases were cited in argument :—

For the appellant—*Peetambur Chatterjee* v. *Kalee Churn Roy* (1); *Rashesur Surmah* v. *Kaleekanath Surmah* (2); *Shah Mahkanlal* v. *Srikrishna Singh* (3); *Sobodra Beebee* v. *Deendyal Lall* (4); *Kemble* v. *Farren* (5); *Omda Khanum* v. *Brojendro Coomar Roy Chowdhry* (6); *Brojokishore Roy* v. *Madhub Persad Misser* (7); *In the matter of the petition of Nobocoomar Bose* (8); *Mackintosh* v. *Crow* (9); *Balkishen Das* v. *Run Bahadur Singh* (10); *Behary Lall Doss* v. *Tez Narain* (11).

For the respondent.—*Bichook Nath Panday* v. *Ram Lochun Sing* (12); *Boley Dobey* v. *Sideswar Rao Baboo Roy Kur* (13); *Muthura Persad Sing* v. *Luggun Kooer* (14).

The judgment of the Court (NORRIS and MACPHERSON, JJ.) was as follows :—

We are of opinion that this appeal should be dismissed.

Two grounds have been taken by the learned pleader for the appellant. In the first place, he complains that the Court below was wrong in not allowing his client, the plaintiff, to allocate

(1) 11 B. L. R., 137 note ; 14 W. R., 436.
(2) 11 B. L. R., 138 note ; 11 W. R., 445.
(3) 2 B. L. R. P. C., 44.
(4) 11 B. L. R., 438 note.
(5) 3 M. & P., 425., S. C. ; 6 Bing., 141.
(6) 12 B. L. R., 451 ; 20 W. R., 317.
(7) 12 B. L. R., 456 note ; 17 W. R., 373.
(8) 12 B. L. R., 457 note ; 17 W. R , 431.
(9) I. L R., 9 Calc., 689.
(10) I. L. R., 10 Calc., 305.
(11) I. L. R., 10 Calc., 764.
(12) 11 B. L. R., 135 ; 19 W. R., 271.
(13) 4 B. L. R. Ap., 92.
(14) I. L. R., 9 Calc., 615.

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the money value of the grain payments made by the defendants to him towards the extinction of certain debts due from the defendants to the plaintiff, before the execution of the mortgage bond upon which this suit is brought; and he based his contention upon s. 60 of the Contract Act. That section says: "Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits."

It is impossible to say that there are here "no other circumstances" indicating to which debt the payment was to be applied. There is not only no evidence on the record to show that there had been an agreement between the parties that the antecedent debt or debts should be liquidated by payments of grain, but there is specific evidence that this one debt—the debt upon this bond—should be liquidated by payments in kind and not in money. We think, therefore, that the Courts below were abundantly right in disallowing the plaintiff's claim to allocate these grain payments towards the extinction of the debts due before the execution of this bond.

The second ground upon which the learned pleader relies is this, that the Courts below are in error in having treated the interest mentioned in the bond as a penalty and not as liquidated damages.

The exact terms of the bond are not set out in the plaint: they have been read to us; they amount to this, that there is a present advance of Rs. 44-1, and bygone debts amounted to Rs. 73-15, and the mortage was in consideration of Rs. 118. There was a stipulation that, if the whole mortgage debt was not repaid by deposit of crops by Bysakh 1287, then one per cent. per mensem as interest should be charged, not from the breach of the contract, that is to say, not upon the failure to deliver any of the specified quantities of the grain at the specified time, but the interest was to run from the date of the bond. A great many cases as to whether this, under the circumstances, is to be considered as penalty or liquidated damages have been cited before us.

The case which the learned pleader for the appellant has relied upon most strongly is the case of *Behary Lall Dass* v. *Tej Narain* (1). That case was decided by Mr. Justice Tottenham and myself, and though in that case no reference is made to a good many of the cases, which have been cited here, and though the distinction which is drawn by Mr. Justice Wilson in the case of *Mackintosh* v. *Crow* (2) is not there taken, yet the distinction does, as a matter of fact, exist, and though it is not the *ratio decidendi* in that case, it none the less exists. In the case of *Behary Lall Dass* v. *Tej Narain* (1) the increased rate of interest became due upon the breach of covenant and not from the date of the original bond. Now, the distinction seems to be, as we think, perfectly well drawn by Mr. Justice Wilson. In giving judgment in the case of *Mackintosh* v. *Crow* (2), he points out that practically s. 74 of the Contract Act has done away with the distinction between a penalty and liquidated damages, which, he says, "must be borne in mind in dealing with cases decided before the Contract Act, many of which turned upon this distinction. Under this section, whether a sum would formerly have been held a penalty or liquidated damages, if it be named in the contract as the amount to be paid in case of breach, it is to be treated much as a penalty was before as the maximum limit of damages."

Then he proceeds to point out the distinction between the increased rate of interest to be paid from the date of breach and the increased rate of interest to be paid from the date of the bond. We think that distinction is a well-founded one, and, upon the strength of that distinction, we ought to hold that this interest is in the nature of a penalty and only to be taken into consideration as a basis upon which damages for breach of contract are to be estimated. That being so, we see no reason to interfere with the rate of damages at which the lower Appellate Court has arrived. We, therefore, think that this appeal ought to be dismissed with costs.

J. V. W. *Appeal dismissed.*

(1) I. L. R., 10 Calc, 764.
(2) I. L. R., 9 Calc., 689.